Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-520

CLETE KING,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, CLETE KING, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Court of Criminal Appeals of Alabama rendered on the 19th day of April, 1977, which affirmed the trial court's denial of the Petition for Writ of Error Coram Nobis.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama has not yet been reported. A copy of the Opinion appears in Appendix "A".

The opinion of the Alabama Court of Criminal Appeals has not yet been reported. A copy of said Opinion appears in Appendix "A".

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on the 22nd of April, 1975, and is annexed hereto in Appendix "A", infra, p. 1a.

A timely application for rehearing in the Court of Criminal Appeals of Alabama was denied, without opinion, on the 27th day of May, 1975. The judgment thereon is in Appendix "A", infra, p. 10a.

A petition for writ of certiorari was filed within the time required by the laws of Alabama in the Supreme Court of Alabama, and this was denied on June 12, 1975. The judgment thereon is annexed in Appendix "A", infra, p. 10a.

Petition for writ of error coram nobis was filed with the trial court on June 30, and denied on October 24, 1975.

Appeal was taken to the Alabama Court of Criminal Appeals and the trial court's judgment was affirmed without opinion on May 4, 1976. Judgment thereon is annexed in Appendix "A", infra, p. 11a.

A timely application for rehearing filed in the Court of Criminal Appeals was denied, without opinion, on June 1, 1976. Judgment thereon is annexed hereto in Appendix "A", infra, p. 12a.

Petition for writ of certiorari was filed within the time required by Alabama law, and the Alabama Supreme Court remanded the cause to the Court of Criminal Appeals by its opinion dated December 30, 1976, annexed hereto in Appendix "A", infra, p. 12a.

The Alabama Court of Criminal Appeals affirmed the trial court's denial of the Petition for Writ of Error Coram Nobis in its Opinion entered April 19, 1977, annexed hereto in Appendix "A", infra, p. 16a.

A timely application for rehearing was filed and denied without opinion on May 24, 1977. Copy of the judgment thereon appears in Appendix "A", infra, page 18a.

A petition for writ of certiorari was filed within the time required by Alabama law and denied without opinion on July 8, 1977. A copy of the judgment thereon appears in Appendix "A", infra, p. 19a.

QUESTIONS PRESENTED

I.

Whether Rule 60(b) of the Alabama Rules of Civil Procedure has abolished writs of error coram nobis in criminal as well as civil cases and substituted therefor a different procedure which may be employed to obtain relief from a judgment.

II.

Whether a party, in view of Rule 60(b), Alabama Rules of Civil Procedure, is bound by the label he puts on his papers, or whether a procedural device for attacking a judgment, which may be erroneous in form, should be treated by the trial court as if it were the correct procedural device for attacking the judgment.

III.

Whether or not the judgment of the Court of Criminal Appeals of Alabama is in conflict with the case of *Turner* v. *State*, 52 Ala. App. 334, 292 So. 2d 143 (1974): That is, notwithstanding the fact that Petitioner has an appropriate remedy under Rule 60(b), Alabama Rules of Civil Procedure, does Petitioner also have a remedy under the old coram nobis procedure in Alabama where he has been unjustly convicted on the basis of the false testimony of a material witness.

IV.

Whether or not it is a denial of due process under the Constitution of the United States for the State of Alabama not to afford an adequate post-conviction remedy where it comes to the attention of the Court subsequent to the time of filing of a Motion for New Trial and the taking of an Appeal that materially false testimony was the basis of the conviction of Appellant in the trial court below.

CONSTITUTIONAL PROVISIONS AND THE STATUTE INVOLVED

I.

Constitution of the United States, Amendment XIV, Section 1:

> Section 1, * * * nor shall any state deprive any person of life, liberty, or property, without due process of law; * * *

II.

U.S.C.S. Rules of Court, Supreme Court, Rule 19:

A review on writ of certiorari . . . will be granted . . .:

(a) Where a state court has decided a federal question of substance . . . in a way probably not in accordance with applicable decisions of this Court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state . . . question in a way in conflict with applicable state . . . law; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise in this Court's power of supervision.

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of Cullman County, Alabama on the charge of selling, removing or concealing property covered by lien or claim and sentenced to a term of three years in the penitentiary.

The chief witness for the State, Robert Petrey, testified that on the date in question he was a loan officer with the First National Bank of Montgomery, Alabama; that on August 4, 1972, Appellant came to the bank and requested a loan to purchase an automobile; that $1,500.00 was advanced to Appellant and the bank took a security interest in a 1970 Plymouth Fury automobile that Appellant was purchasing; that when Appellant came to the bank he did not give a description of the automobile, but said that he was purchasing a 1970 Plymouth II from Courtesy Ford in Montgomery; that he did not have the serial number. Petrey testified at the main trial that he filled out the necessary paper work with the exception of the serial number with the stipulation that Appellant was to call him from Courtesy Ford to give him the serial number. Petrey further testified that Appellant did, in fact, call him and give him the serial number and that he in turn placed the number on the contract. Petrey testified that a UCC-1 financial statement was subsequently recorded and King was given a copy of said statement without the serial number on it. Petrey testified that he gave the $1,500.00 in question to King after he got the serial number from King. Petrey stated at least two times during the main trial that Appellant called him back after he (Appellant) left the bank initially and gave him the serial number. Petrey stated that he

gave Appellant a copy of the disclosure statement which did not have the serial number on it.

On cross-examination, Petrey denied that anyone gave him the serial number other than Appellant. In fact, on R. 65 the question was asked of Petrey: "Are you certain and can you swear today that Mr. Smith in some way did not supply the serial number on the '70 Plymouth II?" Petrey's answer was "Yes." On R. 68, Petrey again made reference to the fact that Appellant had called him and given the serial number to him.

However, at the coram nobis proceeding, Petrey testified in a materially different fashion than he testified at the trial:

> "Mr. Petrey: Based upon information that I have seen from the First National Bank, I was mistaken when I testified that I issued a check to Mr. King in the afternoon. The records indicate that the check was issued in the morning, the date the loan was made. And, as far as the serial number on the automobile is concerned, I cannot testify whether it was given to me by Clete King or by Willie Smith, who was an officer of the bank at that time." (R. 2, p. 33)

Further, subsequent to the coram nobis hearing, the Senior Vice President of the First Alabama Bank (First National Bank) issued a check to Alton Creel Auto Auction in the amount of $646.53, payable to Mr. Creel in the way of a refund (R. 2, p. 36).

Appellant represented himself at trial without the benefit of counsel. After conviction, Appellant filed a

Motion for New Trial on June 25, 1974, which was denied on August 8, 1974. An appeal was taken to the Alabama Court of Criminal Appeals and the conviction was affirmed on April 22, 1975. Appellant's Application for Rehearing was denied on May 27, 1975. Thereafter, Appellant's Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals was denied by the Alabama Supreme Court on June 12, 1975.

Appellant thereafter filed a Petition for Writ of Error Coram Nobis in the Trial Court on June 30, 1975, which was amended on September 9, 1975. Said Petition for Writ of Error Coram Nobis was denied on October 24, 1975. In denying Petitioner's Writ, the trial court stated as follows:

> "THE COURT: Well, I think, under the theory that error coram nobis is still in effect to grant it would be unjustified to grant the writ assuming that the Civil Rules have abolished it. I think that at that point it is still discretionary with the Court whether it ought to be granted or whether it shouldn't be granted.
>
> After considering everything and having considered everything long and hard in this case I don't see that I have much choice, but to deny the writ."

Thereafter the Appellant appealed the denial of the writ of error coram nobis to the Alabama Court of Criminal Appeals. On May 4, 1976, the Court of Criminal Appeals affirmed the lower court without opinion. Appellant then made Application for Rehearing

and said application was overruled without opinion on June 1, 1976. Thereafter, a Petition for Writ of Certiorari was filed in the Supreme Court of Alabama on June 15, 1976, and on December 30, 1976, the Alabama Supreme Court opinioned that from the record it appeared that the Petitioner may have raised a serious constitutional issue and, consequently, the case was remanded to the Court of Criminal Appeals to allow that Court to make such determination as the Record justified. On April 19, 1977, the Court of Criminal Appeals issued its opinion of affirmance; on May 3, 1977, Appellant filed his Application for Rehearing and said Application was overruled without opinion on May 24, 1977. Hence, Appellant filed a Petition for Writ of Certiorari with the Alabama Supreme Court and same was denied without opinion on July 8, 1977. See Appendix "A" (infra p. 19a)

REASONS FOR GRANTING THE WRIT

I.

The first question presented is whether Rule 60(b) of the Alabama Rules of Civil Procedure, has abolished writs of error coram nobis and substituted therefor a different procedure which may be employed to obtain relief from a judgment, more specifically, should the trial court have treated the Petition for Writ of Error Coram Nobis as an independent action under Rule 60 (b), Alabama Rules of Civil Procedure? In pertinent part, Rule 60(b) reads as follows:

> ". . . [T]he court may relieve a party . . . from the final judgment . . . for the following rea-

sons: ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ... or (6) any other reason justifying relief from the operation of the judgment. ... This rule does not limit the power of the court to entertain an independent action within a reasonable time and not to exceed three years after the entry of the judgment . . . to relieve a party from a judgment . . . or to set aside a judgment for fraud upon the Court. Writs of coram nobis, coram vobis, . . . are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

The intent of the drafters of said Rule obviously was to abolish historical limitations which worked unjustly in certain situations not only on the civil side but on the criminal side as well in order that justice might be done without deferring to the label which one attaches to his papers. The Committee Comments to Rule 60(b) are to this effect:

> "Rule 60(b) retains the substance of all the devices listed above, but destroys the artificial boundaries between them. It substitutes for the present separate remedies two simple procedures for a delayed attack upon a judgment, a motion and an independent proceeding. If it has been possible to attack a judgment by any of the devices listed above, it will be possible to attack the judgment by a motion or independent proceeding under this Rule. . . ."

The Committee Comments go on to state that if the relief does not appear to be available under the Rule, then the party should bring an independent proceeding, citing 3 Barron and Holtzoff Federal Practice and Procedure, §1331 (1958). Pertinent and supportive language of Petitioner's contention is found in Moore's Federal Practice, Vol. 7, p. 341, as follows:

> ". . . [T]o the extent that precedent dealing with these old remedies would warrant relief in a situation not covered by Clauses 1-5, then that precedent is persuasive for the ground of relief under residual Clause 6. If, however, the precedent is against relief or no precedent to the old remedies can be found, then that is not conclusive that relief should not be granted under Clause 6 for the 1946 revision did not intend to perpetuate the uncertainties and historical limitations which work unjustly in certain situations."

The Committee Comments which apply to Rule 60(b) state that an erroneous choice between remedial procedures is not fatal to the party attacking the judgment since nomenclature is no longer important. *Bankers Mortgage Company* v. *United States*, 42 F. 2d 73, a Fifth Circuit Court of Appeals case, stands for the proposition that a party is not bound by the labels he puts on his papers. It would be unrealistic and unjust for a Court to allow relief in one case and deny it in another case when an injustice has been done in either event. In *United States* v. *Mierzanka*, (D.C. Mich. 1949), 89 F. Supp. 573, an application for Writ of Error Coram Nobis was treated as a Motion to Vacate Judgment and Sentence since the Writ had been abolished.

Subdivision (6) of Rule 60(b), Alabama Rules of Civil Procedure, authorizes a motion for relief for "any other reason justifying relief from the operation of the judgment." Thus, the Court is empowered to vacate any judgment whenever such action is appropriate to accomplish justice. *L. M. Leathers' Sons* v. *Goldman*, (Ct. of Appeals 6th Cir. 1958), 252 F. 2d 188; *In Re Cremidas' Estate*, (D.C. Alaska 1953), 14 F.R.D. 15. Petitioner is presenting a situation to this Court where he was convicted on the basis of materially false testimony, and the trial court was unaware of the fact that Petrey's testimony was, in fact, false until the hearing on the Petition for Writ of Error Coram Nobis. It is therein that the trial court erred in denying Appellant's Petition. Further, it should be noted that the Petitioner does not seek to reopen questions which have been fully considered by the jury; he is only asking that the true facts as disclosed at the Coram Nobis Proceeding be considered for the first time by a jury. In *United States* v. *Karahalias*, Judge Learned Hand spoke for the Court of Appeals for the 2nd Circuit when he said:

> "In short — to put it quite boldly, we read the subsection [(6)] as giving the Court a discretionary dispensing power over the limitation imposed by the Rule itself on subsection (1), (2) and (3). (Ct. of Appeals 2d Cir. 1953, 205, F. 2d 331)."

Judge Hand went on to state:

> "Thus, where cases of extreme hardship or injustice are presented to the Court a more liberal dispensation than a literal reading of the Rule is allowed. Indeed, there is little reason why application for relief from a judgment should not be considered in the same broad perspective as an independent action to vacate or set aside the judgment."

In Alabama Courts writs of error coram nobis have always been treated as civil in nature. *State* v. *Bibby*, 47 Ala. App. 240, 252 So. 2d 662; *Ex Parte Wilson*, 272 Ala. 439, 155 So. 2d 611. The Alabama Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure. Therefore, federal cases cited herein which support Appellant's contention should be given great weight. Writs of error coram nobis per se have been abolished in criminal cases in federal prosecutions, *United States* v. *Mierzanka*, supra, and it would be unrealistic for any Court to deny relief in the instant case considering that relief would have been granted below had "proper nomenclature" been utilized.

II.

The judgment of the Alabama Court of Criminal Appeals and the Alabama Supreme Court is in conflict with the case of *Turner* v. *State*, 52 Ala. App. 334, 292 So. 2d 143; that is, notwithstanding the fact that Appellant has an appropriate remedy under Rule 60(b), Appellant also has a remedy under the old coram nobis procedure in Alabama since he was unjustly convicted on the basis of materially false testimony. In *Turner* v. *State*, supra, the Court of Criminal Appeals set out the criteria for gaining relief by way of coram nobis proceeding:

"(a) The original judgment was tainted with fraud, actual or constructive;

(b) There was no acquiescence by the defense therein;

(c) A factual basis existed which, if made known, would prevent original judgment; and

(d) The failure to make this exonerating fact known earlier is not chargeable to the prisoner."

There is no question but that the original judgment was tainted with constructive fraud as defined in Black's Law Dictionary, 4th Ed., p. 789 (1957). Constructive fraud is therein defined as ". . . [A]n act, statement or omission which operates as a virtual fraud on an individual, or which, if generally permitted, would be prejudicial to the public welfare, and yet may have been unconnected with any selfish or evil design."

The second condition of *Turner* is met because there was no acquiescence by Petitioner to the false testimony of Petrey.

Third, there now exists a factual basis which, had it been made known to the Court at the time in question, would have prevented judgment.

Fourth, Petitioner cannot be charged with negligence in failing to make the fact known at the time of the trial because he is only a mortal and as such was unable to delve into the mental processes of Witness Petrey and thereby determine that Petrey was going to

testify in a materially false fashion. Petitioner had every right to expect that Petrey would testify in a manner consistent with what the bank records reflected.

Thus, the four pronged test as set out in *Turner* has been met with compliance.

III.

It is a denial of due process under the Constitution of the United States for the State of Alabama not to afford an adequate post-conviction remedy where it comes to the attention of the Court subsequent to the time of filing a Motion for New Trial and the taking of appeal that materially false testimony was the basis of the conviction below. Whether a state must afford a post-conviction remedy was the threshold question in *Case* v. *Nebraska*, 381 U.S. 336, 85 S. Ct. 1486. One of the propositions of law that that case stands for is that the States *must* afford a clearly defined method by which prisoners can raise claims of denial of constitutional rights. Alabama, however, does not have a wide variety of post-conviction remedies as do some states. In essence, Alabama has the following: (1) motion for new trial; (2) a writ of error; (3) appeal; (4) writ of error coram nobis. These are essentially the post-conviction remedies that we have in Alabama, recognizing, of course, that writs of certiorari are amongst these remedies; that habeas corpus is available to those who are incarcerated; and that, in proper cases, one may resort to the Federal Courts for relief.

In the instant case, the evidence which was so vital to Petitioner's defense was not brought to light until

after the time had come and gone during which a motion for new trial could have been filed. Nor was this vital information brought to light prior to the time for taking an appeal. The Alabama Supreme Court has now held that coram nobis is not the correct procedural device to use in the instant case and that the Alabama Rules of Civil Procedure do not have application in this case. A writ of error, as defined by T. 51 §383, Code of Alabama 1940 (recomp. 1958), may only be granted on some error of law (on the transcript of the record). Therefore, the Code precludes adducing proof *aliunde* the record as on new trial. Habeas corpus as a post conviction remedy has no application in the instant case in that Petitioner is not presently incarcerated.

Thus, there is no post conviction remedy which provides relief in the instant case other than writ of error coram nobis and/or an independent action under Rule 60(b) of the Alabama Rules of Civil Procedure, both of which the Alabama Courts say have no application in the case at bar. The only two possible answers to the problem are either to say that Rule 60(b) of the Alabama Rules of Civil Procedure has application to criminal cases or to give a broader and more pragmatic definition to the old writ of error coram nobis.

There is apparently no such problem at the Federal level since in 1948 Congress adopted the Statutory Post-Conviction Remedy for Federal Prisoners, 28 U.S.C. §2255, that was designed to serve as a substitute for habeas corpus. By its terms, Section 2255 does not impose an absolute bar on use of Federal habeas corpus by Federal prisoners. Section 2255, like habeas

corpus, extends to all constitutional claims. Consequently Section 2255 has been construed to mean that if a wrong has been practiced Section 2255 will provide a remedy. In *United States* v. *Morgan*, 346 U. S. 502, 74 S. Ct. 247, we find an excellent discussion of the extraordinary writ of coram nobis which should have equal application to the case at bar.

> "The writ of coram nobis was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment, and was used in both civil and criminal cases. . . . Coram nobis has had a continuous although limited use also in our states. Although the scope of the remedy at common law is often described by references to the instances specified by *Tidds Practice*, . . . its use has been by no means so limited. It has been used in the United States, with and without statutory authority, but always with reference to its common law scope — for example, to inquire as to the imprisonment of a slave not subject to imprisonment, the insanity of a defendant, a conviction on a guilty plea through the coercion of fear of mob violence, failure to advise of the right to counsel. . . .[I]n *Davis* v. *Packard*, 8 Pet. 312, 8 L.Ed. 957. It was used by the Court of Errors and approved by this Court, to correct an error 'of fact not apparent on the face of the record' in the trial court, to-wit, the fact that Mr. Davis was consul-general of the King of Saxony and therefore exempt from suit in the State Court.

> . . . Under the rule of *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 . . . a Federal trial without competent and intelligent waiver of counsel bars a conviction of the accused. Where it cannot be deduced from the record whether counsel was properly waived we think no other remedy being then available . . . this motion in the nature of the extraordinary writ of coram nobis must be heard by the Federal trial court. Otherwise a wrong may stand uncorrected which the available remedy would right."

CONCLUSION

In the Court of Criminal Appeals' opinion dated April 22, 1975, See Appendix "A", infra, page 1a, the Court stated that a case for the jury was presented because there was a conflict in the testimony. However, the material testimony in this case is no longer evenly divided, but now is overwhelmingly on the side of the Appellant, CLETE KING. There is no longer a conflict in the evidence as to the material issues as then existed.

In effect, a fraud has been perpetrated on our judicial system. It is now apparent that there was never a meeting of the minds as to which automobile was to be used as collateral for the loan in question. Apparently Smith got the serial number in question from a 1970 Plymouth Fury which was obviously not the one that Appellant intended to post as security.

Petitioner is not asking that the Alabama courts wholesale adopt the Alabama Rules of Civil Procedure, rather the only rule which has application

to criminal cases is Rule 60(b), which deals with the abolition of writs of error coram nobis for the simple reason that relief by way of coram nobis has always been considered a civil proceeding in Alabama. The Federal Courts have so held, and our Rule 60(b) is identical to its Federal counterpart, except for the time limitations. On the other hand, the four-pronged test of *Turner*, supra, has been met with compliance. The contemporary function of the Writ is such that it is no longer necessary that the State have knowledge that the false testimony was in fact false or perjured. It is significant that this is not one of the criterion listed in *Turner*. The contemporary function of the Writ is to provide relief when relief in equity and good conscience ought to be granted. Thus, in a case such as this where Petitioner is sentenced to the penitentiary because of the materially false testimony of the chief witness for the state, there is a public as well as a private interest to be protected as the very integrity of the judicial process is assaulted if there be no remedy in our State system of criminal justice for one so unjustly convicted.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of October, 1977.

_____

OF COUNSEL

APPENDIX "A"

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF
CRIMINAL APPEALS
OCTOBER TERM, 1974-75

6 Div. 760

Clete King

v.

State

Appeal from Cullman Circuit Court

DeCARLO, JUDGE

In a two-count indictment, Clete King was charged with false pretenses and selling, removing or concealing property covered by lien or claim. After a trial where he undertook his own representation, he was convicted on the second count and sentenced to three years.

I

He now complains the court committed reversible error when it did not advise him of the hazards of representing himself. Counsel argues the record must show accused was offered counsel but intelligently and understandingly rejected the offer. He declares anything less is not a waiver.

The question is not whether the trial judge adhered to a specific procedure but whether accused was competent to exercise an intelligent, informed judgment. *U. S. v. McGee*, 242 F. 2d 520.

Although the record does not affirmatively show an interrogation by the court on this matter of pro se representation and waiver of counsel, it is not a silent record as characterized by *Carnley v. Cochran*, 369 U. S. 506, 82 S. Ct. 884. There is a proper showing, on the record taken as a whole, that appellant knowingly waived his right to counsel, *U. S. v. Flattner*, 330 F. 2d 271. This is indicated first by Amendment to the Indictment which reads:

> ". . . and after having had leave of the Court, and with and by the agreement in open Court of the defendant, Clete King, *who has previously in the record indicated to the Court that he is financially able to employ an Attorney of his choice but who wishes to represent himself without the benefit of any legal counsel whatever*, amends the Indictment by correcting a typographical error in the Vehicle Identification Number from PM43LOF179233 to read Vehicle Identification Number PM43LOF129233 in both Count one and Count two of the Indictment." (Emphasis ours).

This infers that the court had inquired into the appellant's decision to proceed without assistance of counsel.

Secondly, this information is contained in the judgment entry:

"1974, April 17th, The defendant herein informs the Court that he does not have counsel to represent him herein and asks the court to appoint counsel to represent defendant and in response to such request the Court hereby appoints Honorable Finis St. John III, a practicing and duly licensed attorney of the Alabama Bar, who is well educated and trained and a graduate of the University of Alabama Law School, to represent defendant in this case and said attorney accepts such appointment and agrees to represent defendant in this case as his attorney.

"1974, April 17th, The defendant, with his attorney of record, being present in open Court for arraignment, defendant having waived reading of indictment, Defendant then pleads not guilty. Case set for trial on May 13, 1974.

"1974, May 13, This day in open Court comes the Defendant with his court appointed attorney, Hon. F. E. St. John III, and advises the court that he is not indigent, that he is employed, able and desires to employ an attorney of his choice.

"It is, therefore, considered, ordered and adjudged by the court that Hon. F. E. St. John III, be and hereby is relieved of any duties as the attorney for defendant.

"It is further, considered, ordered and adjudged that this case be continued until May 27, 1974, to allow defendant to employ his own attorney.

"1974, May 28, This day in open Court comes the defendant, Clete King, who *represents himself* and comes also Hon. Julian Bland, District Attorney, for the State of Alabama, and defendant having heretofore been arraigned and having plead not guilty, this case proceeds to trial with a jury. (Emphasis ours).

"1974, May 29, Comes now the Foreman, Larry E. White, and eleven other jurors, who, having been impanelled and sworn according to law, and having heard all the evidence and the Court's oral charge in this case upon their oaths do say: 'We, the Jury, find the defendant guilty as charged in Count Two of the Indictment.'

"It is therefore, considered, ordered and adjudged by the Court that the defendant is guilty of Selling, Removing or Concealing Property Covered by Lein [sic] or Claim.

"1974, May 29th, Defendant being in open Court and being then asked by the Court if he had anything to say why the sentence of the law should not now be pronounced on him the defendant says, 'No Sir. The Court has been fair. I have no objections to the Court."

From these recitals we can certainly conclude that appellant demonstrated an awareness of the necessity of counsel, and the right to counsel of his choice or court-appointed counsel.

Preceding appellant's testimony in the transcript we find these statements by the court:

". . . Now as I told you earlier, Mr. King, is the defendant in this case, he going to represent himself. He has a legal right to do that . . ."

* * *

". . . Put this into the record. Now, ladies and gentlemen, what you expect in the course of this trial is that the attorneys first of all, *let me say that the case is somewhat different in respect to a normal case in that Mr. Clete King here, the defendant, has elected to represent himself without the benefit of an attorney. He has a right to do that* . . ." (Emphasis ours).

"Let the record further reflect that Mr. King is the defendant in this case and he is appearing here as a witness *without benefit of counsel at his own choosing.*" (Emphasis ours).

This statement by the court reiterates appellant's prior determination to proceed without the benefit of counsel.

The facts do not indicate appellant's age but show he worked for Courtesy Ford Motor Co., in Montgomery, Alabama, for two and one-half to three years. Further, there is evidence he had sold some fifty cars at Alton Creel's Auto Auction in Cullman, Alabama. Appellant testified he had gone out of the car business and moved to Mobile for the purpose of entering medical school. After his arrest on these charges he lost his job and had to drop out of school.

The foregoing facts illustrate that appellant appeared to possess sufficient intelligence and a capacity to appreciate the consequences of a pro se defense.

These comments by appellant during the trial displayed his comprehension of the charges and proceedings against him:

> ". . . I am an ex-convict. I had to serve seventeen months and fifteen days in federal prison. I have the knowledge and I know what would happen to me if I sold mortgaged property. And there is no way in the world that I would do it. I have never sold — never been arrested before the time that I was arrested for buying stolen tractors . . ."

Throughout this trial the court allowed appellant an abundant leeway in the conduct of his defense and on numerous occasions came to his assistance.

Clete King was on trial for a non-capital felony and was certainly not a newcomer to the judicial processes. Based upon the foregoing, we believe he knowingly made the choice to conduct his own defense with his eyes open.

It could be said the case at bar is a prime example of a trial with "built in error." Regardless of how a court proceeds, it could fall into error. This problem will always exist for the trial judge when a defendant asserts the right to try his own case. If granted, upon reflection, the defendant most likely would attack his conviction, claiming he did not understand what he

was doing or that the court should have given him counsel. On the other hand, if the request is denied, then he could complain a constitutional right had been withheld. Courts should not be manipulated in this manner.

II

Appellant maintains the evidence did not sufficiently show he had sold the car covered by the bank's claim and reasons that because the testimony concerning the car's identification was evenly divided, he should have been acquitted. *Lester v. State*, 270 Ala. 631, 121 So. 2d 110.

In essence, appellant is asserting these facts elicited at trial were insufficient to prove his guilt beyond a reasonable doubt. Robert Petrey, assistant cashier of the First National Bank of Montgomery, transacted a loan for Clete King on August 4, 1972, for the purchase of a 1970 Plymouth, from Courtesy Ford Motor Co., of Montgomery. All the paper work was completed except for the serial number which appellant was to call and give him. Later, by telephone, Mr. King furnished the serial number and that afternoon returned to pick up his check. Serial Number PM43LOF129233 was inserted on the Security Agreement and Financial Statement by Mr. Petrey, but it was not added to those copies previously given appellant. The loan officer acknowledged that King had made several loans in the past and had called in serial numbers one or more times.

On August 17, 1972, while the debt was still outstanding, the 1970 Plymouth was sold to Grant Wales

through the Alton Creel Auto Auction in Cullman. Wales paid $1,375.00, and received a Bill of Sale showing Clete King as seller and bearing serial number PM43LOF129233.

Alton Creel, operator of the auto auction, testified November 14, 1973, and after confronting appellant about this, King said he would take care of it that weekend. However, when he failed to do so by the following Wednesday, Mr. Creel paid the indebtedness and received an assignment.

In a telephone conversation with W. S. Brewbaker, an attorney for the First National Bank, King admitted owing the money but stated the car sold through the auction was not the vehicle covered by the bank's mortgage.

Appellant denied selling the car financed by the bank and maintained it was still in Montgomery. He claimed the purchase money check was given to him at the time Mr. Petrey prepared the loan papers, and he did not then or at a later time give the bank a serial number.

As often stated by our courts, conflicting testimony presents a jury question, *Cooper v. State*, 31 Ala. App. 356, 18 So. 420, and it is within the jury's province to determine the weight or credibility to be accorded witnesses' testimony, *Jones v. State*, 40 Ala. App. 419, 114 So. 2d 575.

In our judgment, the foregoing facts presented questions for the jury's determination and were sufficient to sustain the conviction. The motion for a new trial was properly overruled.

III

To sustain the appellant's conviction under Title 14, Section 363, Code of Alabama, the State must prove that the bank had a lawful and valid claim to the car sold by the appellant, *Williams v. State*, 40 Ala. 687, 122 So. 2d 549. Appellant insists his transaction with the bank was not executed in compliance with Title Section 319 (b), Code of Alabama, and that deficiency would cause the abatement of any civil action. Further, since no right to a civil action exists, there cannot be a "lawful or valid claim" on which to predicate the criminal charge.

The State responds that the accord between the bank and appellant created an equitable lien, which existed in favor of the bank regardless of the validity of any legal lien. *Layfield v. Lewis*, 268 Ala. 666, 109 So. 2d 838; *Rhodes v. Schofield*, 263 Ala. 256, 82 So. 2d 236.

It is our judgment the State's contention is correct based on the holding in *Courtney v. State*, 10 Ala. App. 141, 65 So. 433, that equitable liens come within the purview of this statute.

Our search of the record revealed no error.

AFFIRMED.

All the Judges concur.

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

6th Div. 157

Cullman Circuit Court

May 27, 1975

Clete King,

Appellant

versus

The State,

Appellee.

It is ordered that the application for rehearing be and the same is overruled.

Ex parte: Clete King, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Clete King v. State of Alabama)

Comes the petitioner and the petition for writ of certiorari to the Court of Criminal Appeals being submitted and duly examined and understood by the Court, it is considered and ordered that the Petition for Writ of Certiorari to the Court of Criminal Appeals be, and the same is hereby denied.

June 12, 1975

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

6th Div. 157

Cullman Circuit Court

May 4, 1976

Clete King,

Appellant,

versus

The State,

Appellee.

Affirmed.

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

6th Div. 157

Cullman Circuit Court

June 1, 1976

Clete King,

Appellant

versus

The State,

Appellee

It is ordered that the application for rehearing be and the same is overruled.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1976-77

Ex parte: Clete King

PETITION FOR WRIT OF CERTIORARI
TO COURT OF CRIMINAL APPEALS

(Re: Clete King
S. C. 1901 versus
State of Alabama)

BEATTY, JUSTICE.

This case is before us on petition for writ of certiorari after application to the Court of Criminal Appeals for a rehearing was denied.

Clete King was found guilty by a jury of the charge of selling, removing or concealing property covered by a lien, in violation of Tit. 14, § 363, *Alabama Code*, and sentenced to three years in the state penitentiary. Upon the denial of his motion for a new trial he appealed to the Court of Criminal Appeals which affirmed his conviction and later denied his application for rehearing. We denied his petition for writ of certiorari in that case.

Then King filed a petition for writ of error coram nobis which the trial court denied after an evidentiary hearing. This denial was appealed to the Court of Criminal Appeals which affirmed the trial court without opinion. Application for a rehearing was denied and this petition for certiorari followed.

From the record of the trial court on this petition, the briefs and oral argument we perceive that the principal issues here concern the nature and availability of post-conviction relief, whether it is found under Rule 60(b), ARCP or common law coram nobis and whether the petitioner has met the requirements thereunder.

Noting that the case comes to us on certiorari from the Court of Criminal Appeals, we cannot go to the record since we are limited by findings of fact of that court. *Grant* v. *City of Mobile*, 291 Ala. 458, 282 So.2d 291 (1973). From what is before us, however, we cannot determine whether that court's decision recognized that King had a remedy either under 60(b) or the common law standards set out in *Johnson* v. *Williams*, 244 Ala. 391, 13 So.2d 683 (1943) and case law thereunder, but failed to establish it, or whether it decided no remedy existed for King either under Rule 60(b), or common law coram nobis, despite the facts established in the trial court as set out in the record. From this record, however, it appears that the petitioner may have raised a serious constitutional issue. For this reason, we must remand the case to the Court of Criminal Appeals in order to allow that court to make such a determination as the record justifies.

Cause remanded to the Court of Criminal Appeals for further consideration in conformance with this opinion.

REMANDED.

Heflin, C. J., Bloodworth, Maddox, Faulkner, Jones, Shores and Embry, JJ., concur.

Almon, J., dissents.

ALMON, Justice (Dissenting):

Petitioner appealed to the Court of Criminal Appeals from a denial of his petition for writ of error coram nobis. The Court of Criminal Appeals affirmed

without opinion and denied the application for rehearing without opinion.

In the petition for writ of certiorari no constitutional questions are raised. Petitioner failed to utilize Rule 39(k), Rules of Appellate Procedure, which is the vehicle designed to present to this court additional facts. Rule 39(k) is as follows:

> "(k) *Scope of Review*. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.
>
> "The application of the law to the stated facts is included in the scope of review."

This is a no opinion case where no constitutional grounds are asserted and where Rule 39(k) is not utilized; nothing is presented for review. The petition for writ of certiorari should have been denied. *Ex parte Larry Wade Phelps, alias*, 11 ABR 247.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1976-77

6 Div. 157

Clete King

versus

State

Appeal from Cullman Circuit Court

After Remandment

HARRIS, JUDGE

This case was affirmed by this Court on May 4, 1976, without an opinion. Application for rehearing was overruled on June 1, 1976, without an opinion.

The case reached the Supreme Court on a petition for certiorari and the case was remanded for this Court to consider Constitutional issues raised by appellant under the common law coram nobis or under Rule 60(b) of the Alabama Rules of Civil Procedure.

When the case was originally submitted to this Court we carefully searched the record for errors, including Constitutional questions, which injuriously affected the substantial rights of appellant and

found none. We determined that the case did not warrant a formal opinion.

The Rules of Civil Procedure have no application in criminal proceedings. See the Committee's Comments following Rule 1 and *Burns v. State*, ____ Ala.App. ____, 327 So.2d 920.

The common law writ of error is still a part of our criminal system of justice and is constantly resorted to in proper cases.

At the coram nobis hearing Mr. Robert L. Petrey, the loan officer at the First National Bank of Montgomery who handled the loan transaction with Mr. King, testified that "Based upon the information that I have from the First National Bank I was mistaken when I testified that I issued a check to Mr. King in the afternoon. The records indicate that the check was issued in the morning, the date the loan was made. And as far as the serial number on the automobile is concerned I cannot testify whether it was given to me by Clete King or by Willie Smith, who was an officer with the bank at that time."

Mr. Petrey further stated that he testified to what he believed to be the truth at the time of Mr. King's original trial.

In denying the writ the Court stated that appellant had ample opportunity to have the bank records available at his original trial and was *negligent* in not doing so.

There is no allegation in the petition and, of course, no proof that the State *knowingly used perjured testimony* to convict appellant on the original trial.

In *Ex parte Brannan*, 41 Ala.App. 500, 139 So.2d 349 and *Horsly v. State*, 42 Ala.App. 567, 172 So.2d 56, this Court held that to obtain coram nobis relief from a conviction on the ground of perjured testimony the testimony must be shown to have been knowingly used by the prosecution and the convict must not have been negligent.

The fact that a witness gave contradictory testimony does not establish that a defendant was convicted on false or perjured testimony. *Echols v. State*, 276 Ala. 489, 164 So.2d 486.

It is our considered judgment that the trial court correctly denied the petition for writ of error coram nobis and the case is due to be affirmed.

AFFIRMED.

All the Judges concur.

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

6th Div. 157

Cullman Circuit Court

May 24, 1977

Clete King,

Appellant

versus

The State,

Appellee

It is ordered that the application for rehearing be and the same is overruled.

Ex parte: Clete King, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Clete King v. State of Alabama)

Comes the petitioner and the petition for writ of certiorari to the Court of Criminal Appeals being submitted and duly examined and understood by the Court, it is considered and ordered that the Petition for Writ of Certiorari to the Court of Criminal Appeals be, and the same is hereby denied.

July 8, 1977